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Supreme Court of the United States

OCTOBER TERM, 1960.

No. [illegible]

ALFRED S. GATLIN, TALMADGE R. GATLIN and J. SHELBY GATLIN, d/b/a GATLIN LUMBER COMPANY,

Petitioners,

versus,

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

J. C. FLOYD
O. W. CAMERON
Counsel for Petitioners
[illegible]

INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
FEDERAL STATUTES INVOLVED	4
STATEMENT	4
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	13
APPENDIX I: (Pertinent Testimony from Record of Trial Court Proceedings)	15
APPENDIX II: (Pertinent Portions of Proceedings in Trial Court Including Memorandum Opinion, Judgment and Writ of Injunction	26
APPENDIX III: (Proceedings Before Court of Appeals for the Fifth Circuit Including Opinions, Judgment, and Order Overruling Petition for Rehearing)	30

Case.

Woods Lumber Company vs. Tobin, 6th Cir., 1952, 199 Fed. (2d) 455	12

Statutes and Regulations.

	Page
Sections of the Fair Labor Standards Act of 1938, as amended:	
Section 206	4
Section 207	4
Section 211 (c)	4
Section 213 (a) (15)	2, 4, 5, 8, 9, 12, 13
Section 215 (a) (2), 215 (a) (3), 215 (a) (5)	4
Section 217	5
Webster's New International Dictionary	10

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Mulfred S. Gatlin, Talmadge R. Gatlin and J. Shelby Gatlin, d/b/a Gatlin Lumber Company, Petitioners, by and through J. C. Floyd and O. W. Cameron, their attorneys, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 15, 1961.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern Division of the Southern District of Mississippi (R. 283-291) is reported in 179 Fed.Sup. 260, and the pertinent portions thereof are printed as Appendix II to this Petition for Writ of Certiorari. The majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit (R. 312-321) are reported in 287 F. 2d 76, the same being appended to this Petition as Appendix III, A and B, respectively.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on February 15, 1961, (R. 322) and order of said court denying Petition for Rehearing was entered on April 4, 1961 (R. 323). Copies thereof are appended to this Petition as Appendix III, C and D, respectively. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

The complaint filed by Respondent charged petitioners with violating the wage, hour record keeping and shipping provisions of the Fair Labor Standards Act of 1938, as amended, such complaint seeking to enjoin petitioners from further violations. Petitioners denied the violations charged, and asserted affirmatively that some of the employees involved were exempt from the wage and hour provisions of said Act, under Section 213 (a) (15), of Title 29, U. S. C., which statute is

quoted at length under the heading "Federal Statutes Involved", appearing next in this petition.

While a number of questions were presented in the trial of this action and on appeal to the United States Court of Appeals for the Fifth Circuit, it is Petitioners' desire to limit the questions presented in this Petition, so that the only questions presented are:

1. Whether the trial court and the Court of Appeals for the Fifth Circuit erred in finding that three of appellants' employees, Mack Lee, A. N. (Ab) Bell, and Ollie Jones, were to be considered as employees in petitioners' logging or forestry crew; and as a consequence of such finding, whether such courts erred in finding that petitioners' forestry or logging crew was not exempt from the applicable provisions of the Fair Labor Standards Act of 1938, as amended, so that petitioners violated the wage, hour, record-keeping and shipping provisions of said Act as to all of the employees of said forestry or logging crew.

2. Whether the Circuit Court of Appeals for the Fifth Circuit unduly and improperly enlarged the coverage and effect of definition given by Congress to Forestry crew employees under Section 213 (a) (15) Title 29 U. S. C., particularly employees involved in "tending" trees, and "preparing" or "transporting" logs to the mill; and whether, as a consequence, such courts erred in issuing injunction against petitioners, and allowing it to stand.

FEDERAL STATUTES INVOLVED.

Sections 206, 207, 211(c), 213 (a) (15), 215(a) (1), 215 (a) (2), 215 (a) (5), and 217 Title 29 U. S. C. were involved in the trial court and in the Court of Appeals for the Fifth Circuit, and will be indirectly and incidentally involved here. However, the prior section of this petition indicates the limiting of the questions to be here presented, so that the federal statute principally involved is a construction of the meaning and application here of said Section 213 (a) (15), Title 29 U. S. C., providing as follows, to-wit:

> "§213. Exemptions:
>
> (a) The provisions of sections 206 and 207 of this title shall not apply with respect to . . . . (15) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad or other transportation terminals, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed twelve."

STATEMENT.

Mulfred S. Gatlin did business during the period involved, and now does business in the rural town of Waynesboro, Mississippi, with his two sons, Talmadge and Shelby, these men doing business as Gatlin Lumber Company. Mr. Gatlin was a man 52 years of age at time of trial, whose education was limited to the eighth grade. Each of his sons completed their respective

high school educations under the GI Bill of Rights after World War II but received no training in bookkeeping, accounting, or administrative work.

Complaint in this civil action was filed by respondent in the United States District Court for the Eastern Division of the Southern District of Mississippi on September 30, 1957, being based upon an examination and investigation of petitioners' books and operations extending from August of 1955 through August of 1957 (R. 2-6). Acting under the provisions of Section 217, Title 29 U. S. C. (giving the District Courts of the United States jurisdiction to restrain violations of said Act) respondent sought to enjoin alleged violations by petitioners of specified sections of the Fair Labor Standards Act of 1938, as amended. Petitioners denied the charges of violations in their answer, stating affirmatively that some of their employees were exempt from regulation under the wage and hour provisions of the Act by said Section 13 (a)(15) thereof. (R. 9-14).

The evidence adduced at the trial of this action disclosed that during all of the period involved, petitioners maintained a force of between 70 and 100 employees in their operations as Gatlin Lumber Company. The evidence further disclosed that it was petitioners' intention, generally, to comply with the Fair Labor Standards Act of 1938, as amended, as to all of their employees, with the admitted exception of their forestry or logging crew. Petitioners intended that the employees in such forestry or logging crew number 12 or less at all times, so that said crew would qualify for exemption from

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the wage and hour provision of said Act, under the above quoted Section 13(a) (15) thereof.

Consistent with this plan concerning the forestry or logging crew, petitioners' books and records disclosed and they testified that they hired Mack Lee as foreman, and between 5 and 10 other employees to comprise a forestry or logging crew up until about March 1, 1956 (R. 239-240). At that time, J. W. Gatlin, (not one of petitioners here) who had theretofore been farming for himself and not employed by petitioners, was employed by Gatlin Lumber Company as foreman of the logging crew. Thereafter, throughout the balance of the period involved, said crew consisted of J. W. Gatlin as foreman and from 5 to 10 other employees.

At the time that the said J. W. Gatlin was hired as foreman of said crew, Mack Lee was changed to an entirely different capacity, still in petitioners' employ. Petitioners had purchased standing timber from the United States Government located in the DeSoto National Forest (R. 65-67), which was some 25-30 miles away from petitioners' mill in Waynesboro, Mississippi (R. 260). Two independent contractors, having their own employees, and operating entirely separately from Gatlin Lumber Company, were contracted with to cut said timber, as marked and designated by government employees. Mack Lee went back and forth between Gatlin Lumber Company and said two independent contract mills, as a sort of "liaison" man, taking orders for particular cuts and sizes of lumber to said mills, so that lumber would be delivered in needed dimensions

(R. 158-161). In connection with cutting sawlogs from said timber, the limbs and tree tops would make some pulpwood, and the evidence indicated that Mack Lee did check to see that the pulpwood was delivered to petitioners' customers, and was not diverted from petitioners' credit.

The wage and hour investigator arbitrarily added Mack Lee to petitioners' forestry and logging crew, also adding two other employees, A. N. (Ab) Bell and Ollie Jones; and the pertinent testimony concerning the employment of the said Mack Lee, A. N. (Ab) Bell and Ollie Jones has been printed as Appendix I to this Petition.

The evidence in the trial of this case shows that the said A. N. (Ab) Bell did work ". . . sort of in the same line as Mr. Lee", (R. 105); and, that he collected for little pulpwood bills and things like that (R. 241), and that he did odd jobs, like picking up needed machine parts (R. 242).

This addition of three employees to said crew brought the number therein to 14 employees during 26 pay periods, 13 employees during 22 pay periods, 12 employees during one pay period, 11 employees during one pay period and 8 employees during one pay period (R. 288). This automatically placed petitioners in violation under the wage, hour, record-keeping and shipping provisions of the Fair Labor Standards Act of 1938, as amended, as to a very substantial proportion of their entire employee force.

The Trial Court entered its Judgment and issued an injunction against petitioners, which have been printed as Appendix II to this Petition, along with pertinent portions of the Trial Court's *Memorandum Opinion.*

The Court of Appeals for the Fifth Circuit affirmed the trial court, holding that the said Ollie Jones was employed in "tending" trees, and the said Mack Lee and A. N. (Ab) Bell were employed in "preparing" and "transporting" logs and pulpwood to the mill, within the meaning of said Section 213(a)(15) of said Act.

The majority opinion appears at pages 312-321 of the record, being printed as Appendix III, Sub-paragraph *A* to this Petition.

The dissenting opinion of Circuit Judge Jones (dissenting from affirmance of district court's judgment insofar as it related to the forestry or logging crew) stated that he could not join the determination by the majority that the evidence sustained the finding that the said Mack Lee, Ollie Jones and A. N. (Ab) Bell were "employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill" so as to require their inclusion with petitioners' forestry crew. This opinion is found on page 321 of the record, and has been printed as Appendix III, Sub-paragraph *B* to this petition.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because it erroneously interprets said Section 213(a)(15), Title 29, U. S. C., and unduly enlarges and extends the coverage and effect of definition given by Congress to Forestry crew employees under said statute, particularly employees involved in "tending" trees, and "preparing" or "transporting" logs to the mill. There is apparently little decided law on the questions here presented, and no cases closely in point.

As is apparent from the hereinabove quoted Section 213(a)(15), Title 29, U. S. C., Congress provided that the terms and conditions of the wage and hour sections of the Fair Labor Standards Act of 1938, as amended, would not apply with respect to employees in certain Forestry categories, so long as the total number of such employees did not exceed 12. The statutory definition of such employees may be broken down into two categories, the first category covering employees employed in; (a) planting or tending trees, (b) cruising, (c) surveying or (d) felling timber; the second category covering employees employed in preparing or transporting logs or other Forestry products to the; (a) mill, (b) processing plant, (c) railroad or other transportation terminal.

In considering this break-down of said statute, it should be noted that the second category mentioned covers the life of timber only from planting through growth and cutting until the logs or other Forestry

products are prepared for or transported to the mill, processing plant, or transportation facility. Lumber company employees whose duties are not involved with such stages of the development and cutting of timber would not be included on the Forestry crew of such company.

We do not find cases helping to make clear the Legislative intent of the words used in said statute, and must resort to common sense and a good dictionary. In the first category, employees employed in ". . . planting or tending trees" are covered, it being apparent from the use of the word "or", with the phrase being followed by a comma, that the words "planting" and "tending" are to be considered as synonymous. In its context, the word "planting" is obvious in its meaning; and by reference to Webster's *New International Dictionary*, the word "tending" must mean "to cultivate or foster, as a plant", if said word is to be synonymous with the word "planting". To attach any other meaning to this word, and to attempt to say that any one who might report a forest fire in timber land, or any one who might arrest a trespasser on farm or forestry land would be "tending" trees within the meaning of said phrase (planting or tending trees) would be to entirely leave what petitioners consider to be the obvious Legislative intent of said portion of said statute. Yet, the Court of Appeals for the Fifth Circuit thus enlarged and extended the meaning of said phrase to cover petitioners' employee, Ollie Jones, a Constable and Deputy Sheriff who was hired merely to make occasional automobile trips around and through petitioners' farm and timber lands

to check on possible fires and trespassers (R. 317; also, see Appendix III, Sub-paragraph A to this Petition).

Next, in considering the first category above set forth, the Court may prefer to consider the words, "cruising, surveying or felling timber" together, since there is absolutely no evidence in the record in this action that any of the three employees, Mack Lee, A. N. (Ab) Bell and Ollie Jones, performed any services in these categories for petitioners, at any time. The trial court found (R. 287) that the duties of these three employees involved *cruising* petitioners' timber land to see that it was not stolen, but the Court of Appeals for the Fifth Circuit agreed with petitioners that this was an erroneous use of the word "cruise" as applied to Forestry operations (R. 317). An examination of the pertinent portions of the testimony adduced at the trial of this action, having to do with the employment of the said Mack Lee, A. N. (Ab) Bell and Ollie Jones (Appendix I to this Petition) should suffice to convince the court that no one of said employees was engaged in . . . "cruising, surveying or felling timber" within the meaning of such statute.

It should be noted that the second category above mentioned is very limited, covering only employees of a lumber company employed in preparing or transporting logs or other Forestry products to the mill, processing plant, or transportation facility. This category could not cover the actual sawing of logs into different dimensions and sizes of lumber at the mill, and could not cover an employee who gave orders at said mill for

logs already at the mill to be further sawed into various sizes and dimensions of lumber; nor could said second category cover an employee who checked to see that pulpwood already cut reached a designated customer, or collected bills from a customer. Furthermore, it would be unreasonable to decide that an employee who went to purchase necessary parts for the maintenance and repair of a sawmill would be covered by said second category above mentioned, or by any portion of the definition clearly set forth in said Section 213(a)(15) of Title 29 U. S. C. Yet, the Court of Appeals for the Fifth Circuit decided that ". . . substantial parts of the activities of Lee and Bell were in 'preparing' and 'transporting' of logs and of pulpwood to the mill, processing plant or terminal." As above stated, petitioners feel that an examination of the pertinent portions of the testimony adduced at the trial of this action, concerned with the duties of the said three employees, will suffice to convince this court that said employees and no one of them should be included in petitioners' Forestry crew, in determining the number employed in such crew.

The Court of Appeals for the Fifth Circuit referred only to the case of *Woods Lumber Company vs. Tobin*, Sixth Cir. 1952, 199 Fed. 2d 445 in reaching its decision on said three employees, but we submit that said case is not in point and is easily differentiated. In the said *Woods Lumber Company* case, the court decided that men operating tow boats and derrick boats, and in handling and unloading barges engaged in transporting logs and other Forestry products to the mill would be

included in a logging or Forestry crew, and their number would be included in determining if the Forestry crew exceed 12. Certainly, it is easy to see that such employees in the *Woods Lumber Company* case were engaged in ". . . transporting logs or other Forestry products to the mill, processing plant, railroad or other transportation terminal . . ." within the meaning of said Section 13(a)(15) of the Act.

This could not be in point with any duty performed by Mack Lee, A. N. (Ab) Bell, Ollie Jones or any one of them.

CONCLUSION.

The questions presented by this action are obviously of great importance to petitioners. Beyond that, however, petitioners call to the court's attention the fact that there are very few cases interpreting and giving effect to said Section 213 (a)(15) Title 29, U. S. C.; and, there is absolutely no other case directly in point with the holding of the Court of Appeals for the Fifth Circuit here. If the very broad construction given to the words of said statute by the Court of Appeals for the Fifth Circuit is allowed to stand, precedent is established for the future finding that almost any employee of a lumber company would have duties consisting of "tending" trees, or "preparing" or "transporting" logs or other forestry products to the mill. The ultimate effect might well be, by judicial construction, to seriously curtail or even eliminate the exemptions intended by said statute, even though such exemptions have been provided for and allowed by Congress.

For the reasons set forth above, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

J. C. FLOYD,
O. W. CAMERON,
By .....
Attorneys for Petitioners,
1401 Dixie Towers,
Meridian, Mississippi.

CERTIFICATE OF SERVICE.

I, the undersigned, J. C. Floyd, one of the attorneys for petitioners, do hereby certify that the foregoing Petition for Writ of Certiorari, with Appendices thereto, has been served upon respondent by mailing thereof, postage pre-paid by U. S. Air Mail to Harold G. Nystrom, Acting Solicitor of Labor, United States Department of Labor, Washington, D. C., Attention: Miss Bessie Margolin; and to the Solicitor General, Department of Justice, Washington, D. C.

This 9 day of May, 1961.

.....
J. C. FLOYD.

APPENDIX I.

Pertinent Testimony Concerning Place of Work and Duties of Three Employees (Mack Lee, A. N. (Ab) Bell and Ollie Jones), Who Petitioners contend Should not be Included as Member of Petitioners' Logging or Forestry Crew in Determining Applicability of Exemption from provisions of Sections 206 and 207 of Fair Labor Standards Act, under Section 213 (a) (15) Title 29, U. S. C.:

A. Testimony as to Mack Lee:

1. Testimony of Talmadge R. Gatlin, one of the Petitioners hereon; (a) on cross-examination by Respondent's attorney, as adverse witness; and, (b) on direct examination:

(a) Pages 65-67, Vol. I of Record:

"THE COURT:

What kind of work does Mack Lee do?

"WITNESS:

He is—supervises the cutting of lumber and pulpwood.

"Q. Is he working over in the National forest now?

"A. Yes sir; over in the Desoto National Forest

"Q. Gatlin Lumber Company has a contract with the Government allowing it to cut lumber from the National forest; is that right?

"A. We bought some timber.

****

"Q. Now, does Mack Lee see to—I mean the saw mill crews over there, are there any saw mill crews over in the National forest—

"A. There is two saw mills.

"Q. —cutting up this—

"A. There is two saw mills over there.

"Q. Are they employees of Gatlin Lumber Company?

"A. They are contract mills, they cut by the thousand board feet.

"Q. Who owns each of those?

"A. Mr. J. W. Palmer owns one, Mr. Willie Utsey owns one.

"Q. The lumber comes to Gatlin Lumber Company, doesn't it?

"A. Yes, sir.

"Q. Now, what woods crews are over there; does each of those men have a woods crew?

"A. Yes, sir; they—I don't know whether they have their own woods crew or whether they just contract their logging; I don't know.

"Q. Well, is it Mr. Mack Lee's responsibility to see to it that they do cut the right timber which Gatlin is entitled to and that they don't cut the wrong timber which would subject Gatlin to liability?

"A. Well—

"Q. Is that right?

"A. —he is to see that it is manufactured, that the lumber is made right, and that we get it after it is made, and also he is to watch out for—

"Q. Who tells the woods crew where to cut timber and pulpwood?

"A. Well, when it is bought, it is bought in a unit, and you just cut a unit at the time.

"Q. Does Mr. Mack Lee have anything to do with straightening out the boundaries and keeping the boundaries?

"A. No sir; the boundaries are marked off by the Government men, and they check on that.

"Q. You don't have a right to cut unlimited trees; it is selected cutting, isn't it?

"A. Yes, sir; it is marked trees.

"Q. Well, doesn't he have a job to see to it that they cut the right trees and no others; that is included in Mr. Mack Lee's duties, isn't it?

"A. Well, the Government fellows—they have fellows come in there and look after that."

(b) Page 260, Vol. II of Record:

"Q. . . . How far away from you does Mack Bell work, I mean Mack Lee work, excuse me?

"A. Well, its about—I imagine thirty—twenty-five or thirty miles"

2. Testimony of Mack Lee, Respondent's Witness; (a) on examination by the Court; and, (b) on cross-examination by Petitioners' attorney:

(a) Pages 158-160, Vol. II of Record:

"THE COURT:

In detail, Mr. Lee, what are your duties; what do you get paid for doing?

"WITNESS:

Well, I—

"THE COURT:

Turn around and look that way; tell everyone in the court room what you do; what do you do?

"WITNESS:

That is what I do; I look—I tend to Mr. Gatlin's—he sent me out to—

"THE COURT:
I can't hear you.

"WITNESS:
I say he sent me out there to look after his cutting his stuff and his lumber.

"THE COURT:
To look after the cutting?

"WITNESS:
That's right, and see—

"THE COURT:
Wait a minute; what do you do when looking after the cutting, how do you do that?

"WITNESS:
Well, you measure lumber out, tell them, you know, what—give them an order, I got one right here in my pocket.

"THE COURT:
You give the saw millers the orders?

"WITNESS:
Yes, sir.

"THE COURT:
Where do you get those orders?

"WITNESS:
Well, I get them from Mr. Gatlin.

"THE COURT:
How often do you get them?

"WITNESS:
Well, when—as he needs them.

"THE COURT:
Then after you give them the orders that you get from Mr. Gatlin, about how to cut it, what do you do about seeing if they do or don't?

"WITNESS:
Well, we all get it.

"THE COURT:
Do you check them on that?

"WITNESS:
Yes, sir.

"THE COURT:
What else do you do?

"WITNESS:
Well, they manufacture it and send it to Mr. Gatlin.

"THE COURT:
What do you do?

"WITNESS:
Oh, me, well, I'm around on the job, sometimes I go one mill, then I be back at the other.

"THE COURT:
What do you do?

"WITNESS:
Well, I just see after it, see.

"THE COURT:
How do you see after it?

"WITNESS:
Well, see that they cut it, you know, like it's supposed to be cut.

"THE COURT:
How do you do that?

"WITNESS:
Well, you cut what is marked. I say, you cut what is marked.

"THE COURT:
Who marks it?

"WITNESS:
The Government has it marked.

"THE COURT:
All right, what if they miss it?

"WITNESS:
What if they which?

"THE COURT:
What if they miss some that the Government has marked?

"WITNESS:
Supposed to get it.

"THE COURT:
What if they don't?

"WITNESS:
Well, if they don't, why, ain't nothing you can do about it."

(b) Page 161, Vol. II of Record:

"Q. Mr. Lee, when the saw mills actually take a saw log and saw it up into lumber, do you check the sawing of that log into lumber?

"A. Well, I don't check it, you know, I measure it, see if it is cut right, you know, right size you know got to be cut.

"Q. Do you check to see then that that lumber, when it is cut, is then shipped on over to Gatlin Lumber Company?

"A. Yes, sir."

B. Testimony as to A. N. (Ab) Bell:

1. Testimony of Talmadge R. Gatlin, one of Petitioners here, as adverse witness, on cross-examination by Mr. Neilson, Respondent's attorney, and by Court (Page 105, Vol. I of Record):

"Q. Now, what were Mr. A. N. Bell's duties?

"A. Mr. Bell is a sort of looks out after some of the little mills.

"Q. Doesn't he also look out after the timber?

"A. Well, no, he don't look out after timber.

"Q. Doesn't he report forest fires, and doesn't he report timber thefts?

"A. If he gets knowledge of it he does.

"Q. That is part of his duties, isn't it?

"A. If he finds out about it, well, he will report it.

"THE COURT:

What are his duties?

"MR. NEILSON:

Sir?

"THE COURT:
What are his duties?

"MR. NEILSON:
We are not sure, ourselves.

"THE COURT:
I am asking the witness.

"MR. NEILSON:
Excuse me.

"WITNESS:
He supervises some of the cutting of the little mills, sort of in the same line as Mr. Lee, and he also keeps a check on pulpwood that leaves the woods to see that we get credit on it, goes to the right places, and any errands or anything that is to be done either from the mills; why, he makes contact from the mill to the little mills, carries word back and forth."

2. Testimony of Talmadge R. Gatlin, one of Petitioners here, on direct examination (pages 241-242, Vol. II of Record):

"Q. How about Mr. A. N. Bell, I think that it is shown on your prior examination that Mr. Bell has had periods of not working, he hasn't worked now for several months, but when he is working there, just exactly what has been his duties?

"A. Mr. Bell goes out around some of the little mills at times, too, and if we get in an order or something that the little mills should have something to work on, he takes it out and turns it over to them and gets them started in the operation of getting what we need out.

"Q. Who does your collecting for little pulpwood bills and things like that?

"A. Mr. Bell, he goes around to different wood yards and collects the—for the wood, and he keeps check on some of the wood, just like Mr. Lee, and—

"Q. On the—you mean which wood, the cut lumber?

"A. The logs and loads of wood that—not logs but the loads of wood as brought in, and there has been several instances when Mr. Bell would—they would lose four or five or six loads of wood, we wouldn't have it, he would know where to go get it.

"Q. If Mr. Bell was anything, he just went around and did a lot of odd jobs; is that right?

"A. That's right; we need a part from machine shop here in Meridian, we get Mr. Bell to run pick it up for us.

"Q. What age man is Mr. Bell?

"A. He's—I imagine he's—

"Q. Is he above sixty, would you guess?

"A. He is sixty, I expect, maybe a little better, he's in World War I."

C. Testimony as to Ollie Jones

1. Testimony of Respondent's Witness, Ollie Jones, on cross-examination by Petitioners' attorney (pages 165-167, Vol. II of Record):

"Q. Mr. Jones, what is that badge you are wearing?

"A. It is a constable, Beat Four, Wayne County.

"Q. Yes, sir; when were you elected constable?

"A. Four years ago.

"Q. Now, do you consider that your primary work, your basic work?

"A. Well, I just do what I have to do, you know, as it comes to me, whatever duty is.

"Q. Yes, sir.

"A. And also, in looking after Mr. Gatlin's property around, why, I have been appointed as deputy sheriff, I have authority every where I catch anybody on his land, you know, trespassing, why, I could pick them up.

"Q. Yes, sir.

"A. And otherwise—

"Q. Yes, sir; now, you—that applies to his farming lands, to, you caught anybody trespassing on his farming lands, you could do the same things, couldn't you?

"A. Yes, sir; I imagine so.

"Q. Yes, sir.

"A. That is what I understand.

"Q. And now, if you found a fire, you wouldn't help put it out, would you?

"A. I have done it.

"Q. That is not expected of you, is it?

"A. No, no, it is not expected of me, but I have taken the brush and went by and whipped out a little fire behind.

"Q. As a matter of fact, if you were passing anybody's land and knew who owned it, and you saw a fire, you would let them know it was on fire, wouldn't you?

"A. Why—oh, yes, I report it on anybody's land; that is what I am there for, is to keep the fires down, not only just for him but for anybody that needs it.

"Q. Just looking at it as a fact, the fact that you are a deputy sheriff and a constable and have the right to actually arrest trespassers in getting them off of Mr. Gatlin's land has a great deal to do with the reason you are employed, doesn't it?

"A. Yes, sir.

"Q. Yes, sir. Have you ever had anything to do with cutting of timber on Mr. Gatlin's land?

"A. No, sir; I don't never have anything to do with cutting of the timber whatever.

"Q. Have you ever chosen any trees that were going to be cut?

"A. Sir?

"Q. Have you ever chosen any trees that were going to get cut?

"A. No sir; no, sir; I don't have anything to do except just my job.

"Q. You've never surveyed any?

"A. No, sir; no, sir.

"Q. Or never cruised any timber?

"A. No, sir.

"Q. Never planted or tended any trees?

"A. No, I never planted no trees.

"Q. Did you ever help prepare logs for loading them up and taking them to the mill?

"A. No sir.

"Q. I think—did you ever work under Mr. J. W. Gatlin on his logging crew?

"A. No, sir; never have."

2. Testimony of Talmadge R. Gatlin, one of Petitioners here, on direct examination (page 242, Vol. II of Record):

"Q. Now, how about Ollie Jones; would you hire Ollie Jones if it wasn't for the fact that he is a law enforcement officer?

"A. Well, that is sort of—

"Q. That is principally it, isn't it?

"A. That is what got him his job."

APPENDIX II.

Pertinent Proceedings in the United States District Court for the Eastern Division of the Southern District of Mississippi:

A. Portion of *Memorandum Opinion* of the United States District Court for the Eastern Division of the Southern District of Mississippi, dated November 6 and filed November 9, 1959, after trial of this case, dealing with inclusion of Mack Lee, A. N. (Ab) Bell, and Ollie Jones as members of petitioners' logging or forestry crew in determining applicability of exemption from provisions of Sections 206 and 207 of Fair Labor Standard Act, under Section 213(a) (15) of Title 29, U.S.C. (pages 287-89 of Volume II of record):

> "During the time herein involved, the defendants had three employees named Mack Lee, Ollie Jones, and A. N. (Ab) Bell, . . . These last three named employees, Lee Jones, and Bell, are the three employees the defendants contend are exempt under the forestry exemption of the Act. Their duties involve the supervision and the cutting of lumber and pulpwood from defendants' land and on other lands the defendants have contracted to cut the timber on, to report any trespassing, and to cruise defendants' timber land to see it is not being stolen, to supervise some of the cutting of the small contract sawmills, and to keep check on the pulpwood that is hauled from the woods to see that it gets to the defendants' mill. Defendants' forestry crew works under the supervision of the crew's foreman, J. W. Gatlin. The number of defendants' employees engaged in forestry activities during the period re-

flected by the evidence were, if it is concluded that Bell, Lee and Jones were forestry employees, 14 employees during 26 pay periods, 13 employees during 22 pay periods, 12 employees during one pay period, 11 employees during one pay period, and 8 employees during one pay period. The plaintiff concedes that during the work-weeks when there were 12 or less employees in the forestry crew, the entire crew was exempt from the Act. It is also conceded by the defendants that the logging or forestry crew in many instances worked overtime and did not receive pay according to the provisions of the Act. In other words, if this Court finds that Lee, Jones and Bell were engaged in forestry operations within p. 13(a) (15) of the Act, then these defendants, in many instances, violated the provisions of the Act concerning minimum wage, overtime, and record-keeping as to all the forestry crew.

"Upon all of the evidence submitted, this Court now specifically finds that Mack Lee, Ollie Jones, and A. N. (Ab) Bell, each had some forestry duties and, further, that the defendants failed to meet the burden of proving exemption, insofar as these employees are concerned, from the Fair Labor Standards Act. . . . It appears to this Court that the forestry exemption seems to apply to the broad category of lumbering and or forestry operations and that the duties performed by Mack Lee, Ollie Jones, and A. N. (Ab) Bell make it necessary to include those employees in the total of the employees engaged in the defendants' forestry or lumbering operations. This means, of course, that in almost 50 of the pay periods involved, the defendants insofar as all of their forestry employees were concerned violated the minimum wage, the overtime, the shipping, and record-keeping provisions of the Act."

B. Judgment of trial court (style omitted—R 292):

In accordance with the memorandum opinion made and entered in this cause on this date and for the reasons set out therein and for good cause shown, it is the ORDER, JUDGMENT and DECREE of this Court that Mulfred S. Gatlin, servants or employees, or persons acting in their behalf, be and they are hereby permanently enjoined and restrained from violating the minimum wage (p. 15 (a)), and the record-keeping (p. 11(c)) provisions of the Fair Labor Standards Act of 1938, as amended.

It is the further ORDER, JUDGMENT and DECREE of this Court that the costs of this action be and they are hereby taxed against the defendants.

Done, this the 6th day of November, 1959.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE."

OB 1959 Page 138.

C. Writ of Injunction (style omitted—R 292-294):

"To the above-named defendants and each of them: TAKE NOTICE that you and each of you, your agents, servants, employees and persons acting in your behalf, be and you are hereby permanently enjoined and restrained from violating the minimum wage (p. 6(a)), the overtime (p. 7(a)), the shipping (p. 15(a)), and the record-keeping (p. 11(c)) provisions of the Fair Labor Standards Act of 1938, as amended.

This writ of injunction is issued pursuant to the memorandum opinion and judgment of this Court dated the 6th day of November, 1959.

Done, this the *9th* day of November, 1959.

/s/ Loryce E. Wharton
Clerk of the District Court of the United States for the Southern District of Mississippi
(SEAL) By Esther Carter, Deputy

Received The Within Writ At Meridian, Miss. on November 12th; 1959. And On November 12th, 1959. At R.F.D. Waynesboro, Mississippi. I Executed The Within Writ Personally On Each Of The Within Named Defendants, Mulfred S. Gatlin, Talmadge R. Gatlin, and J. Shelby Gatlin, Each of Whom Is Named As A Defendant In The Within Writ, By Delivering To Each Of Them A True Copy of This Writ, Which Is A Writ Of Injunction, Together With A Copy Of Memorandum Openion, Attached Thereto And Made A Part Of This Writ, This Is The 12th, Day of November, 1959.

Hon. Hugo Newcomb, U.S. Marshal
By /s/ E. P. Miller, Deputy
E. P. Miller

Fee.	3....	At	$2.00....	or $ 6.00
Mi.	106.....	At	10¢	10.60
				$16.60

(Filed—Nov. 19, 1959)."

APPENDIX III.

Proceedings before United States Court of Appeals for the Fifth Circuit resulting in affirmance of lower court, with dissenting opinion:

A. Majority opinion of Circuit Judges Reeves and Wisdom, United States Court of Appeals for the Fifth Circuit, as filed February 15, 1961 (heading and footnotes omitted—see pages 312-321, Volume II of record:

"Before Rives, Jones and Wisdom, Circuit Judges.

"Rives, Circuit Judge: This appeal is from a judgment permanently enjoining the appellants from violating the minimum wage, overtime, shipping, and record-keeping provisions of the Fair Labor Standards Act.

"The Gatlin partners, father and two sons, are engaged in a logging and lumber business in and near Waynesboro, Mississippi. The evidence covered a period of two years from August 17, 1955 through August 1957. During that period, the Gatlins employed between 70 and 100 men. About half of the lumber which they produced was shipped in interstate commerce. It is stipulated that their employees were covered by the Act except for the employees who were claimed by the Gatlins to be excluded by the forestry exemption of the Act.

"The appellants' claims of error fall into three classes:

"1. That the district court erred in law and in fact in finding employees Mack Lee, A. N. (Ab) Bell and Ollie Jones to be forestry employees

within the meaning of Section 213(a) (15), and that, accordingly, the total number of forestry employees was always within the statutory limit for the application of the forestry exemption;

"2. That the district court committed errors of fact concerning violations (a) as to laborers at the planer and sawmill, (b) as to the lumber stackers, and (c) as to the 'key' salaried employees;

"3. That appellants' operations and violations are not of such a nature as to warrant the issuance of an injunction.

"THE FORESTRY EXEMPTION.

"Appellants' principal contention is that Mack Lee, A. N. (Ab) Bell and Ollie Jones were not employed in 'forestry or lumbering operations' within the meaning of Section 213 (a) (15). Excludnig those three employees, it is agreed that during 26 of the 52 pay periods involved, there were 11 forestry employees, and during 22 of such pay periods there were 10 such employees. During the remaining 4 of such pay periods, the number of such employees, including said three, did not exceed the statutory limit of twelve.

"The district court found 'that the duties performed by Mack Lee, Ollie Jones, and A. N. (Ab) Bell make it necessary to include those employees in the total of the employees engaged in the defendants' forestry or lumbering operations.' Lee and Bell did much the same work. They checked the activities of the logging crews who were employees of two small sawmills which cut timber for the Gatlins in DeSoto National Forest. Lee

and Bell were there to make sure 'that the lumber, that the trees they are cutting are getting to them, and the lumber getting on to Mr. Gatlin'. Mr. Lee also supervised the cutting of pulpwood by independent contractors on the Government land. Lee testified on this phase of his work as follows:

'Q. You make a list of all the pulpwood that leaves the National Forest?

A. Well, I don't make a list, I just kind of keep up with the load.

Q. Well, that is to be sure that the pulpwood that leaves there gets to the place it is supposed to go?

A. Where it is supposed to go.'

"As to Bell, one of the Gatlin sons testified:

'He supervises some of the cutting of the little mills, sort of in the same line as Mr. Lee, and he also keeps a check on pulpwood that leaves the woods to see that we get credit on it, goes to the right places, and any errands or anything that is to be done either from the mill, why, he makes contact from the mill to the little mills, carries word back and forth.'

"Ollie Jones testified that all that he had seen Bell do was to check on pulpwood.

"Ollie Jones was a Deputy Sheriff and had been elected Constable of Beat 4 in Wayne County, Mississippi. The Gatlins hired him shortly after that election. His principal duties were to patrol the Gatlin lands to arrest trespassers, to prevent thefts of timber and lumber, and to protect against forest fires.

"Since the employers admit violation of the Act unless they are included in the exemption, the

burden is on them to show that they are plainly and unmistakably within its terms and spirit. The restriction of the exemption to employers who employ not exceeding twelve employees in forestry or lumbering operations was intended to make it applicable only to the small *migratory* lumber milling operations peculiar to the Southeast-called 'peckerwood mills.' 'They cut scrap timber that would not be economical for the larger mills to cut . . . Many of them go out and hire farm boys in the immediate vicinity of the mill. . . . It is an added source of income to these *small-farm people. They are the type of sawmill which is covered by the exemption.*' (Emphasis added.) The language of the exemption should be construed, so far as it reasonably can be, to carry out that intention.

"The legislative history makes it quite clear that forest operations up to the time th logs or products enter the sawmill, processing plant, or transportation terminal are encompassed by the language of the exemption. Here, the rationale was that such work can be performed only under favorable weather conditions. The terms of the exemption are carefully phrased to carry out the intention expressed by the legislative history. The employees included within the exemption are those 'employed in (1) planting or tending trees, (2) cruising, surveying r felling timber, or (3) in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal' (parenthetical numbers supplied). The nouns 'trees,' 'timber,' 'logs,' 'other forestry products,' trace the life of the tree from its inception to its end and one step toward its conversion into lumber or paper. The

verbs correspondingly follow the tree's growth and use. Most of the terms are so clear as not to require discussion. Pulpwood is, of course, a 'forestry product,' indeed, the most usual one other than logs. We agree with the appellants that the word 'cruise' as used in forestry operations means 'to inspect forest land for the purpose of estimating the quantity of timber it will yield,' and that Ollie Jones was not engaged in 'cruising' the timber. Appellants would have us restrict 'tend' to a dictionary illustration of 'to cultivate or goster, as a plant.' So restricted, 'tending' would be almost meaningless in this exemption, for forest trees are not 'cultivated,' or 'fostered' except for an extremely rare pruning. Even a cultivated plant, however, requires protection from insects, depredators and trespassers; and forest trees especially must be protected against trespassers, thieves, and fire. The broader definition of 'tend' as 'to apply oneself to the care of; to look after; to guard; to watch over' appears to us to be the usual and ordinary sense of 'tend' as applied to forest trees, and the sense in which the word is here employed.

"Clearly, substantial parts of the activites of Lee and Bell were in the 'preparing' and 'transporting' of logs and of pulpwood to the mill, processing plant or terminal. Ollie Jones' activities were encompassed by the terminology 'tending trees.' His relation to the 'tending' of trees is much less tenuous than that which the towboat cooks had to the transportation of logs in Woods Lumber Company v. Tobin, 6 Cir., 1952, 199 F. 2d 445, affirming per curiam 20 CCH Labor Cases, Para. 66, 640 (1951).

"We conclude that appellants have not brought themselves 'plainly and unmistably' within the exemption provision.

"CLAIMED ERRORS OF FACT.

"As to the claimed errors of fact concerning violations (a) as to laborers at the planer and sawmill, the district court found: 'that during the two-year period from August, 1955, to the time this action was filed in September of 1957, in over 125 instances these defendants failed to pay their employees, pursuant to the overtime provisions of the Act, for hours worked in a workweek in excess of 40 hours. Instead, they paid overtime wages only for time worked in excess of 80 hours in a two-week period. As a matter of fact, such appears to have been the policy consistently followed in defendants' operation. Such practice invariably resulted in employees failing to receive the proper wages for their overtime work.' The evidence sustains that finding. So much is practically conceded in appellants' brief, but the conduct is minimized as mere 'technical violations of the Act.' We do not agree. Clearly, whether so intended or not, the two-week basis operated to the advantage of the Gatlins in those periods in which the employee worked more than 40 hours in one week and less than 40 hours in the other week. The evidence showed that the two-week basis for computing overtime was used as late as the summer of 1959, nearly two years after this action had been instituted.

"As to (b), the lumber stackers, the district court found: 'that these defendants compensated their stackers on a piece-rate basis only; this

basis generally referred to by the witnesses as payment by the truck. These defendants did not commence to keep accurate hours of their lumber stackers until sometime in 1958. Lumber stackers generally worked five or five and one-half days per week with an average workweek of approximately 45 hours and were never paid anything in excess of the contract rate of $5.50 per truck. No 'regular rate' of pay for these employees was established or converted to an hourly rate.' The evidence sustains that finding, though the practice had been corrected in advance of trial.

"As to (c), the 'key' salaried employees, the district court found: 'that the defendants' millwright, whose duties consisted of keeping up the sawmill, insofar as its mechanical operation was concerned, ordinarily worked 45 hours per week and occasionally worked in excess of that by working on Sundays. He received only a straight salary of $45 per week. Defendants' payroll records, however, reflected that he consistently worked 8 hours a day, 5 days each week. The oral testimony concerning the actual hours the mill wright worked was corroborated by defendants' timebook records, which reflected that he, in certain instances, worked up to 90 and in one instance up to 102 hours during certain two-week payroll periods. Such a practice was also generally true with the planing machine repairman and the machinist.' The evidence sustains this finding. Appellants are not helped by their reference to Walling v. A. H. Belo Corporation, 1942, 316 U.S. 624. Here there is no evidence that the employer and employees had agreed on a 'specific overtime rate of one and one-half times the regular rate.'

We need inquire no further since this essential element of a valid 'Belo' contract is missing in the case at bar.

"PROPRIETY OF INJUNCTIVE RELIEF.

"The district court found:

'In considering whether or not such practices and violations on the part of these defendants necessitate the issuance of an injunction, the evidence reflects that there have been at least three investigations by the Wage and Hour Division of the Department of Labor of the defendants' operations. Upon at least one previous occasion, in 1954 or early in 1955, these defendants were advised that they were violating the overtime and record-keeping provisions of the Act and agreed to correct the violations at that time. The defendants' violations as herein set out have been persistent and continuous, and it is the conclusion of this Court that such persistent and continuing violations make it necessary and appropriate for this Court to enjoin these defendants from further violations of the Fair Labor Standards Act. See Lenroot v. Kemp, 153 F. 2d 153, Mitchell v. Raines, 238 f. 2d 186, and Mitchell v. Hausman, 261 F. 2d 778.'

"Clearly, it was not an abuse of discretion for the district court to grant an injunction. Mitchell v. Hausman, 5 Cir., 1958, 261 F. 2d 778; Mitchell v. Blanchard, 5 Cir., 1959, 272 F. 2d 574.

"The judgment was right, and it is

AFFIRMED."

B. Dissenting opinion of Circuit Judge Jones, United States Court for the Fifth Circuit (dissenting in part):

"I cannot join in the determination by the majority that the evidence sustains the finding that Mack Lee, Ollie Jones and A. N. Bell were 'employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill.' 29 U.S.C.A. Sec. 213(a) (15). I think the evidence shows that they were not so employed. Therefore I dissent from the affirmance of the district court's judgment in so far as it relates to the logging crew. I am in agreement with the rest of the opinion of the majority."

C. Judgment of the United States Court of Appeals for the Fifth Circuit (page 322, Volume II of record):

"JUDGMENT.

Extract from the minutes of February 15, 1961.

"Mulfred S. Gatlin, Talmadge R. Gatlin and J. Shelby Gatlin, d/b/a Gatlin Lumber Company,

No. 18314 versus

James P. Mitchell, Secretary of Labor, United States Department of Labor.

"This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

"ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be, and the same is hereby; affirmed.

"Jones, Circuit Judge. dissents in part."

D. Order of United States Court of Appeals for the Fifth Circuit denying petition for re-hearing dated April 4, 1961, with Judge Jones dissenting (page 133, Vol. II of record; style omitted):

"Appeal from the United States District Court for the Southern District of Mississippi.

(April 4, 1961.)

ON PETITION FOR REHEARING.

Before RIVES, JONES AND WISDOM, Circuit Judges.

PER CURIAM: The petition for rehearing in the above-styled and numbered cause is hereby

DENIED"

"Judge Jones Dissents."